

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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MARK KOHLMAN,

Plaintiff,

ORDER

v.

14-cv-277-wmc

NANCY A. BERRYHILL,  
Acting Commissioner of Social Security,

Defendant.

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On December 2, 2014, the court issued an order and judgment remanding this case to the commissioner for further proceedings under sentence four of 42 U.S.C. § 405(g) pursuant to stipulation of the parties. Now before the court is plaintiff Mark Kohlman's attorney's petition for fees pursuant to § 406(b)(1) in the amount of \$34,395.00. (Dkt. #29.) While pointing out that counsel was effectively fired in February of 2016, defendant does not object to this motion. (Dkt. #34.)

**Fees under 42 U.S.C. § 406**

As part of its judgment, a court may allow "a reasonable fee . . . not in excess of 25 percent of the . . . past-due benefits" awarded to the claimant. § 406(b)(1)(A). The fee is payable "out of, and not in addition to, the amount of [the] past-due benefits." *Id.* Counsel asks the court to approve an attorney fee award in the amount of \$34,395.00, which represents the difference between the prior EAJA fee award and 25 percent of \$105,776.00 and \$57,404.00 that was awarded to plaintiff and his son in past-due

benefits, respectively.<sup>1</sup> Having considered the supporting materials filed by plaintiff's attorney, and hearing no objection from plaintiff or defendant, the court will grant the motion. The fees requested by counsel are reasonable in light of the time he spent on this case and the favorable result he obtained for plaintiff while working on a contingency basis.

Of course, counsel is not allowed to recover both awards. Section 406(b) has been harmonized with the EAJA; though fee awards may be made under both the EAJA and § 406(b), a claimant's attorney must refund to the claimant the amount of the smaller fee. *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002) (explaining that “an EAJA award offsets an award under Section 406(b)”).

#### ORDER

IT IS ORDERED that counsel's motion for attorney fees under 42 U.S.C. § 406(b)(1) in the amount of \$34,395.00 (dkt. #29) is GRANTED.

Entered this 8th day of February, 2017.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge

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<sup>1</sup> The court notes that 25 percent of \$163,180.00 is \$40,795.00; however counsel was previously awarded \$6,400.00. (Dkt. #30.)